No. 14361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California; and DOE I through DOE IV,

Appellees.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

PAGE

Introduction 1

Statement of jurisdiction 1

Statement of the case 2

Statutes involved 4

Summary of argument 8

Argument 9

I.

The Postmaster General was and is without authority to issue the impound order 9

II.

The appellant's mail has been impounded for an unreasonable period of time 9

III.

The due process clause of the Fifth Amendment forbids the action taken against appellant 10

IV.

The Administrative Procedure Act forbids the action taken against appellant in the instant case 12

V.

Appellant has no administrative remedy and is entitled to judicial relief 13

VI.

The agency action is in violation of the First Amendment 16

Conclusion 19

Appendix:

Opinion of Mr. Justice Douglas of the United States Supreme Court ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases

PAGE

Cates v. Haderlein, 72 S. Ct. 47; revers'g 189 F. 2d 369 12

Donnell Mfg. Co. v. Wyman, 156 Fed. 415 9

Door v. Donaldson, 195 F. 2d 764 12

Hannegan v. Esquire, Inc., 327 U. S. 146 16

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 11

Myers v. Cheeseman, 174 Fed. 783 9

Parmalee v. United States, 133 F. 2d 129 17

Reilly v. Pincus, 338 U. S. 269 11

United States v. Morton, 338 U. S. 632 12

Universal Camera Corp. v. The National Labor Relations Board, 340 U. S. 477 12

Walker, Postmaster General v. Popenoe, 149 F. 2d 511 10

Miscellaneous

House Report 1874, 82d Cong., 2d Sess. 8

House Report 2510, 82d Cong., 2d Sess. 6, 8

House Report 171, 83rd Cong., 1st Sess. 6, 7

House Report 569, 83rd Cong., 1st Sess. 7

House Report 850, 83rd Cong., 1st Sess. 8

National Document No. 248, 79th Cong., 2d Sess., 1946 13

28 Virginia Law Review, pp. 635, 646 17

Statutes

United States Code, Title 5, Sec. 1001g 15

United States Code, Title 5, Sec. 1008 15

United States Code, Title 5, Sec. 1009 ..... 1, 13

United States Code, Title 5, Sec. 1009a 14

PAGE

United States Code, Title 5, Sec. 1009c 14

United States Code, Title 5, Sec. 1009e 15

United States Code, Title 18, Sec. 1342 2

United States Code, Title 18, Sec. 1461 2

United States Code, Title 28, Sec. 1291 1

United States Code, Title 39, Sec. 255 ..... 2, 4

United States Code, Title 39, Sec. 259a 2, 4, 5

United States Constitution, First Amendment 8

United States Constitution, Fifth Amendment 8

United States Constitution, Sixth Amendment 8

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Appellees.

APPELLANT'S OPENING BRIEF.

Introduction.

This appeal relates to the right of the Post Office Department to impound appellant's mail without a hearing and before there has been any final determination of illegal activity.

Statement of Jurisdiction.

The jurisdiction of the District Court is based upon the Administrative Procedure Act, 5 U. S. Code, Section 1009, and the jurisdiction of this Court is based upon 28 U. S. Code, Section 1291 and 5 U. S. Code, Section 1009.

The District Court dismissed the Complaint, holding that the Post Office had power to impound appellant's mail pending administrative hearings, and that appellant could not question the impound order itself, because she had not exhausted her administrative remedies.

Statement of the Case.

Appellant, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications and novelties under the firm name and style of Male Merchandise Mart. She duly filed with the Los Angeles County Clerk her certificate of business and published the same in compliance with law.

On March 1, 1954, the Solicitor of the Post Office Department filed a complaint alleging on probable cause that appellant was conducting an unlawful business through the mail in violation of 18 U. S. Code, Sections 1342 and 1461, and of 39 U. S. Code, Sections 255 and 259a.

On the same day, March 1, 1954, the Deputy Postmaster General, not the Solicitor, issued an order to the Postmaster at Los Angeles, California, directing him "to refuse to deliver such mail to the parties claiming the same until their identity and the character of the business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon a date which shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order."

Ever since March 1, 1954, the Postmaster at Los Angeles, California, has refused to deliver to appellant any mail addressed to her, arriving at the Los Angeles Post

Office. On March 1, 1954, a notice was given of a hearing to be held before a hearing examiner on March 17, 1954, in the new Post Office building, Washington, D. C. On the designated date, the appellant appeared by counsel before the Examiner in Washington, D. C., and at that time there was presented to the Hearing Officer certain advertisements which had been sent through the mail by appellant by which she solicited orders for certain books and novelties. None of the articles offered for sale were presented to the Examiner and no evidence was received that any of such articles had been transported through the mail.

On March 19, 1954, appellant filed an action seeking judicial relief restraining and enjoining the appellee from impounding petitioner's mail. The Hon. Harry C. Westover, District Judge of the United States District Court for the Southern District of California, Central Division issued an order to show cause but refused to grant a temporary restraining order or a permanent injunction, and upon motion of appellee dismissed appellant's complaint on the ground that the court did not have jurisdiction of the matter. Judgment was entered dismissing appellant's complaint whereupon appellant filed her notice of appeal and made a motion in the United States Court of Appeals for the Ninth Circuit for relief from the impound order pending appeal. The Court of Appeals being of the opinion that the motion should not be acted upon at this time ordered "that action on the motion of Stanard be held in abeyance until 90 days from and after the said 17th day of March, 1954 to permit the Post Office Department, within this period to make and enter a final and judicially reviewable order or determination in the said

administrative proceedings above referred to and now pending in the Post Office Department.

Appellant applied to Mr. Justice Douglas for relief from the impound order, until her appeal should be heard or the matter otherwise determined. Although the Justice was of the opinion that the impound order was invalid he nevertheless denied the application stating that if he granted the relief sought the issue of the validity of the impound order would become moot. The opinion of Mr. Justice Douglas is attached to this brief as an appendix.

Statutes Involved.

The pertinent statutes are 39 U. S. Code, Section 255, and 39 U. S. Code, Section 259a. Section 255 provides as follows:

> "Identification of persons claiming mail under fictitious address. The Postmaster General may, upon evidence satisfactory to him, that any person is using any fictitious, false, or assumed name, title or address in conducting, promoting, or carrying on or assisting therein, by means of the Post Office Establishment of the United States, any business scheme or device in violation of the provisions of sections 338 and 339 of Title 18, instruct any postmaster at any post office at which said letters, cards, packets, addressed to such fictitious, false, or assumed name or address arrive to notify the party claiming or receiving such letters, cards, or packets to appear at the post office and be identified; and if the party so notified fails to appear and be identified, or if it shall satisfactorily appear that such letters, cards, or packets are addressed to a fictitious, false, or assumed name or address, such letters, postal cards, or pack-

ages shall be forwarded to the dead-letter office as fictitious matter. (Mar. 2, 1889, c. 393, §3, 25 Stat. 873.)"

Section 259a provides as follows:

"Exclusion from mails of obscene, lewd, etc, articles, matters, devices, things or substances:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) Instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

"(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, cor-

poration, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451."

The Post Office Department knows that under existing law it has no statutory authority to impound mail pending administrative hearings. On December 31, 1952, the Select Committee on Current Pornographic Materials issued a report (H. R. 2510, 82nd Cong., 2nd Sess.) which includes the testimony of Mr. Frank, the then solicitor. In the course of his testimony Mr. Frank testified as follows on page 93 of the said report:

> "But I say, and I say it honestly to you people, that we need two acts of legislation to permit the Post Office Department to stop obscene literature going through the mails, and those are the two things I mentioned exemption from Administrative Procedure Act and the impounding bill . . . Under the impounding bill, if they felt that we dealt unfairly with them they can go into their local court immediately, and the local court will go into the question of whether we have treated them fairly. So the Post Office Department cannot act arbitrarily. We are subject to the supervision of the court . . ."

A bill to exempt certain functions of the Post Office Department from the Administrative Procedure Act was introduced on January 3, 1953 (H. R. 171, 83rd Cong., 1st Sess.) and has been referred to a subcommittee of the Committee on Post Office and Civil Service.

A bill to authorize the Postmaster General to impound mail in certain cases was introduced also on January 3, 1953 (H. R. 569, 83rd Cong., 1st Sess.) and while this bill passed the House on April 8, 1954, it has not passed the Senate. H. R. 171 and H. R. 569 follow the recommendation of the majority of the Committee on Current Pornographic Materials heretofore mentioned. At page 117 of the report the committee recommended:

> "Enactment of legislation authorizing (1) the Postmaster General to impound mail *pendente lite* which is addressed to a person or concern which is obtaining or attempting to obtain remittances of money through the mails in exchange for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and (2) exemption of the Post Office Department from the provisions of the Administrative Procedure Act."

A minority report was issued wherein it was said at page 121:

> ". . . Whether the Post Office Department should be exempted from the provisions of the Administrative Procedure Act and whether the Postmaster General should be permitted to impound mail are questions of a more serious nature. The Administrative Procedure Act was designed to assure all persons aggrieved by administrative rulings a fair and comprehensive hearing; the power to impound the mails, may be fraught with objections not immediately apparent. We therefore feel that these are questions to which committees of Congress with the proper jurisdiction should address themselves through specific hearings confined to these limited proposals. We take vigorous exception however to the general

approach to the complex nature of the subject under investigation adopted by the committee." (See also H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 2510, 82nd Cong., 2nd Sess.; H. R. Rep. No. 1874, 82nd Cong., 2nd Sess.)

Summary of Argument.

The District Court's judgment dismissing appellant's Complaint should be reversed for the following reasons:

1. The Postmaster General was without statutory authority, express or implied, to issue the impound order.

2. The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is violative of the First Amendment as a prior restraint on communication.

3. The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity constitutes an infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee.

4. The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is in violation of the Administrative Procedure Act.

5. The impound order was a final order subject to judicial review and the trial court erred in ruling that the order was not subject to judicial reiew.

ARGUMENT.

I.

The Postmaster General Was and Is Without Authority to Issue the Impound Order.

For many years now it has been settled law that the Post Office Department has no power to impound mail pending administrative hearing.

Donnell Mfg. Co. v. Wyman, 156 Fed. 415;

Myers v. Cheeseman, 174 Fed. 783.

In the *Donnell* case the court said:

> "If the Postmaster General . . . had the authority to withhold complainant's mail for six weeks of time it was by reason of some statute. And on the hearing in this court counsel for the Government was wholly unable to present such statute for consideration, and the most diligent search by the court has been with the same result. Apparently it can be said that there is no such statute and therefore no such authority exists."

II.

The Appellant's Mail Has Been Impounded for an Unreasonable Period of Time.

It is now (when this brief was dictated June 2, 1954) more than 90 days that appellant's mail has been impounded without any determination of illegal activity on the part of appellant.

In *Donnell Mfg. Co. v. Wyman,* 156 Fed. 415, the court said:

> ". . . This court can reach no other conclusion than that for six weeks of time the mail cannot be withheld."

III.

The Due Process Clause of the Fifth Amendment Forbids the Action Taken Against Appellant.

Walker, Postmaster General v. Popenoe, 149 F. 2d 511, is a case similar to the one at bar. There the Postmaster, without hearing, refused to deliver merchandise mailed by the Plaintiff until after an administrative hearing was had. Mr. Justice Arnold, speaking for the entire Court, said:

> "In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas implicit under the Fifth Amendment . . . a full hearing is the minimum protection required by due process . . ."

In answer to the argument that to require a hearing before the taking of action would cause irreparable damage to the Government, Justice Arnold said:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk

> criminal prosecution. That was the situation here. Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury."

In *Reilly v. Pincus,* 338 U. S. 269, plaintiff was engaged in an enterprise which the Post Office Department found, after a hearing, to be fraudulent and detrimental to public health. The Supreme Court found that the hearing was defective in that plaintiff was not given full opportunity to cross-examine. Accordingly, an injunction was issued and the plaintiff was allowed to continue his business until such time as a valid administrative order should issue. The Court emphasized the unusually harsh remedies available to the postmaster, indicating that the courts had a higher duty to see that these harsh remedies were not invoked in denial of procedural due process of law.

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, the Court struck down administrative action which was taken without notice or hearing on the grounds that it denied procedural due process of law. In that case, Mr. Justice Douglas said:

> "It is procedure that spells much of the difference between rule by law and rule by whim or caprice."

And Mr. Justice Frankfurter observed that:

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore protect fairness, and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

Even Mr. Justice Reed in dissenting, said:

> "As a standard of due process we cannot do better than to accept as a measure that no one may be deprived of the liberty or property without such reasonable notice and hearing as fairness requires."

IV.

The Administrative Procedure Act Forbids the Action Taken Against Appellant in the Instant Case.

It is now settled law that in cases such as the instant one the Post Office Department must act in accordance with the Administrative Procedure Act.

Cates v. Haderlein, 72 S. Ct. 47, reversing 189 F. 2d 369;

Door v. Donaldson, 195 F. 2d 764.

In *Universal Camera Corp. v. The National Labor Relations Board,* 340 U. S. 477, the court said:

> "The Administrative Procedure Act . . . directs that courts must now assume more responsibility for the reasonableness and fairness of agency decisions than some courts have shown in the past."

In *United States v. Morton,* 338 U. S. 632, the court said:

> "The Administrative Procedures Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise carry them to excess not contemplated in legislation creating their offices. It created safeguards narrower than the constitutional ones, against arbitrary official encroachment upon private lives."

V.

Appellant Has No Administrative Remedy and Is Entitled to Judicial Relief.

The Post Office Department has taken two actions against appellant. First the department filed a complaint signed by the solicitor claiming that appellant was engaged in an obscene business. If it is ultimately found that appellant was engaged in an obscene business the "penalty" will be the loss of the opportunity to receive mail. There is a proceeding pending on this complaint but there has not been a final determination. Second, an impound order issued by the Deputy Postmaster General which has cut off appellant's mail without hearing, and, of course without there having been an administrative order based upon evidence. To say that appellant may not attack the impound order, which is clearly a final administrative order because she is defending herself in the administrative agency in another, although related matter, is a startling proposition and at war with the Administrative Procedure Act.

A review of the Administrative Procedure Act and the House Committee Report thereon is decisive on this point. 5 United States Code, Section 1009 provides for judicial review of agency action. In explaining this section, the House Committee Report on the Administrative Procedure Act (see national document number 248, 79 Cong., 2nd Sess., 1946) states:

> "This section requires adequate, fair, effective, complete and just determination of the rights of any person in properly invoked proceedings."

Commenting on 5 United States Code, Section 1009a, the House Report says:

> "This section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

Commenting on 5 United States Code, Section 1009c, the House Report states:

> "Final action includes any effective or operative agency action for which there is no other adequate remedy in court. Action which is automatically stayable on further proceedings invoked by a party is not final . . . If there is . . . review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. This section permits an agency also to require by rule that, if any party is not satisfied with the initial decision of a subordinate hearing officer, the party must first appeal to the agency (the decision meanwhile being inoperative) before resorting to the courts. In no case may appeal to 'superior authority' be required by rule unless the administrative decision is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative process after administrative action has become, and while it remains, effective."

5 United States Code, Section 1001g, defines administrative action. Commenting on this provision, the House Report states:

> "The term 'agency' brings together previously defined terms in order to simplify the language of the judicial-review provisions of Section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction."

5 United States Code, Section 1008, limits agency sanctions and powers. Commenting on this provision, the House Report states:

> "This section embraces both substantive and procedural requirements of law. It means that agencies may not undertake anything which statutes . . . do not authorize them to do."

5 United States Code, Section 1009e, sets forth the scope of court review. Commenting on this section, the House Report states:

> "Courts are required to determine the application or threatened application or questions respecting the validity or terms of any agency action notwithstanding the form of the proceeding . . . 'Accordance with law' requires among other things a judicial determination of the authority or propriety of interpretative rules and statements of policy . . . 'without observance of procedure required by law' means not only the proceedings required and procedural rights conferred by this bill but any other proceeding or procedural rights the law may require."

VI.

The Agency Action Is in Violation of the First Amendment.

We are treated here to the spectacle of a Government official declaring that certain matter is obscene without ever having seen the material. *Hannegan v. Esquire, Inc.*, 327 U. S. 146, is instructive on this aspect of the case. The court there said:

> "An examination of the items makes plain we think that the controversy is not whether the magazine publishes 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our tradition that a purpose to grant it should not be easily conferred."

The Court discussing second class mailing privileges, said at pages 157-158:

> ". . . Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

See also:

Parmalee v. United States, 133 F. 2d 129.

In 28 *Virginia Law Rev.* 635, there is a note entitled "The Postal Power and Its Limitations on Freedom of the Press." At page 646 there is quoted part of a letter from Mr. Justice Holmes to Sir Frederick Pollock which reads as follows:

> "The Postmaster Generals stops letters and circulars that he (*i. e.,* generally, I suppose, some understaffer) decides to be fraudulent etc., etc. The Constitution 1st Amendment forbids any law abridging the freedom of speech and I can't believe that the stoppage is lawful. I think, in fact, that it has been an instrument of tyranny and used to stop communications that would seem alright to a different mode of thought."

It cannot be emphasized too strongly that there is no evidence that appellant was mailing or attempting to mail obscene material. As Judge Westover observed in his opinion "none of the articles offered for sale were presented to the examiner." The reason why the Post Office Department did not present the articles to the examiner in the course of the Administrative Hearing on the solicitor's complaint is suggested by the testimony of Inspector Simon before the House Committee heretofore referred to where the following transpired at page 95:

> "Mr. Burton: Is there any other typical case that you think would be of interest to the committee? You have described your operation so very clearly here—
>
> Mr. Simon: Well, we have cases where they give the impression that they, from the literature you

get the impression that they, are selling obscene matter, but when the material is received it turns out to be innocuous, and several of these cases have resulted in the issuance of fraud orders. That type of case gives us considerable trouble, along with the border-line material.

Mr. Burton: That is the type that you call fake advertising?

Mr. Simon: Fake obscene."

In the course of the same hearing, Solicitor Frank testified as follows, on pages 94-95:

". . . sometimes you can get five people together and you can give them five pieces of mail, and ask them to mark them, and you will get five different results, because in some cases it is just one of those things that depends on your own personal ideas and your own bringing-up; it depends upon how strongly you feel about things, and there are some types of that material that you just can't get two people to agree on no matter how reasonably and how objectively they look upon it. It is just an honest difference of opinion. We experience it all the time, so we have our conferences, and we decide what is going to be the best thing to do.

Mr. Burton: Those cases are frequently called your border-line cases, are they not?

Mr. Frank: Border-line cases, that is right, and may I say there are many of them, Mr. Counsel.

Mr. Keefe: In mentioning border-line, if I may just inject here, I think that is the group that, without any doubt, gives us the most complaints, gives us the most trouble, because the real pronographic material is not specifically advertised, as we mentioned before, but the man who floods the mails with

these ads, he is dealing many times with an article that he knows is going to cause a lot of trouble, I mean trouble in deciding on it, and very difficult of a criminal prosecution, and those are the things, I think, all the way along, that we are having our great trouble with.

We have no trouble with prosecution on things that are definitely obscene, but it is this material that is this way and that way that is very, very difficult to prosecute."

Conclusion.

The impound order was and is invalid. The mail withheld under this impound order should be turned over to appellant forthwith.

Respectfully submitted,

STANLEY FLEISHMAN,

Attorney for Appellant.

APPENDIX.

Supreme Court of the United States, No. ——, October Term, 1953.

V. E. Stanard, Individually and Doing Business Under the Firm Name and Style of Male Merchandise Mart, Appellant, v. Otto K. Olesen, Individually and as Postmaster of the City of Los Angeles, State of California; and Doe I Through Doe IV, Appellees. Application to Mr. Justice Douglas for Relief From Post Office Department Impound Order Pending Appeal; or in the Alternative for an Injunction Pending Appeal. [May 22, 1954.]

Opinion of Mr. Justice Douglas.

Petitioner operates her business in Hollywood, California, under the fictitious name "Male Merchandise Mart," which has been duly recorded with the state authorities. Her business is selling and distributing through the mails "publications, 'pin-up' pictures and novelties." On March 1, 1954, the Solicitor for the Post Office Department issued a complaint against her, charging that she was carrying on, by means of the Post Office, a scheme for obtaining money for articles of an obscene character; and further charging that she was depositing in the mails information as to where such articles could be obtained, all in violation of 39 U. S. C., §§255 and 259(a), 18 U. S. C., §§1342 and 1461.

On the same day on which the complaint issued, the Deputy Postmaster General ordered the Postmaster at Los Angeles, California, to refuse to deliver mail addressed to petitioner at her business address. The order stated that a complaint of unlawful use of the mails had been filed, that a hearing would be held to establish

whether there were any violations of the applicable statutes, and that the mail addressed to petitioner should be impounded until further order. This order is now in effect. It was issued without notice or hearing.

Petitioner answered the complaint and a hearing was held in Washington, D. C., in March, 1954. At the present time, there has been no final adjudication, administrative or otherwise, that petitioner has violated any statute.

On March 19, 1954, petitioner filed an action for declaratory relief in the District Court for the Southern District of California. She alleged that the Post Office had no power to impound her mail without a hearing, that she was suffering irreparable injury, and that her constitutional rights had been violated. She sought a decree enjoining the so-called impound order, hereinafter referred to as the interim order, and any other order which might be entered by the Post Office, pursuant to the hearing. The District Court dismissed the complaint, holding that the Post Office had power to impound petitioner's mail pending the administrative determination, and that petitioner could not question the administrative proceeding itself, because she had not exhausted her administrative remedies. Petitioner appealed to the Court of Appeals for the Ninth Circuit, where the appeal is now pending. She also made a motion for relief from the interim order, pending review. The Court of Appeals heard argument on the motion and took it under submission, but then vacated the submission and ordered the motion held in abeyance until June 15, 1954, to permit the Post Office Department to make a final and judicially reviewable order. The court stated that it was of the opinion that the motion should not be acted upon at that time.

Petitioner has now applied to me as Circuit Justice for relief from the interim order, until her appeal has been heard or the matter has been otherwise determined. I have heard the parties and have examined the papers presented. No question has been raised as to the power of a Circuit Justice to grant the relief requested, and I will assume that such power exists. Cf. MR. JUSTICE REED'S opinion in Twentieth Century Airlines v. Ryan, 74 Sup. Ct. 8, 98 L. Ed. 29. See also 5 U. S. C. §1009(d). I am not asked to interfere in any way with the administrative proceeding which is now being conducted. That proceeding is authorized by 39 U. S. C. §§255 and 259(a). If the administrative decision is adverse to petitioner, the Post Office will have statutory authority to intercept all mail addressed to her and either send it to the "dead-letter" office, or return it to the senders marked "Unlawful." Petitioner may have judicial review of any order entered under those statutes in an action brought after the administrative adjudication, if not in the case which is now pending in the Court of Appeals. In the present application petitioner complains only of the interim order under which her mail is being intercepted while the administrative proceeding is being conducted. She complains that the interim order was entered without notice, without a hearing, and without any authority in law, statutory or otherwise.

The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and the Sixth Amendments

guarantee. See the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in Leach v. Carlile, 258 U. S. 138, 140, and Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 417, 436; cf. Hannegan v. Esquire, Inc., 327 U. S. 146. I mention the constitutional implications of the problem only to emphasize that the power to impound mail should not be lightly implied. Yet if this power exists, it is an implied one. For I find no statutory authority of the Post Office Department to impound mail *without a hearing and before there has been any final determination of illegal activity.*

Nearly fifty years ago a district court held that there was no such statutory power, see Donnell Mfg. Co. v. Wyman, 156 F. 415. And see Myers v. Cheeseman, 174 F. 783. It has been held that the exercise of a like power without a hearing violated the Due Process Clause of the Fifth Amendment. Walker v. Popenoe, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513. A manual, published by the Post Office Department in 1939, stated that there was no such power. See U. S. Post Office Department, Postal Decision, 328. A bill now pending in Congress would give such power, with certain judicial safeguards. H. R. 569, 83d Cong., 1st Sess. The history of that bill and of related legislation does not show any awareness that the power proposed already exists. See H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 1874, 82d Cong., 2d Sess.; H. R. Rep. No. 2510, 82d Cong., 2d Sess.

The Department of Justice has presented strong policy arguments (both to the Congress and to the courts) that the power is necessary. Within the past year four district courts have accepted those arguments, including the District Court which passed on this case. For the reported

decisions, see Williams v. Petty, 4 Pike & Fischer Admin. Law 2d 203; Barel v. Fiske, 4 Pike & Fischer Admin. Law 2d 207. There is something to be said on the side of the law enforcement officials. For if an illicit business can continue while the administrative hearings are under way, those who operate on a fly-by-night basis may be able to stay one jump ahead of the law. Yet it is for Congress, not the courts, to write the law. Under the law, as presently written, every business, until found unlawful, has the right to be let alone. The Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001 *et seq.*, gives some protection to that right. The power of the Post Office Department to restrain the illegal use of the mails is subject to that Act. Cates v. Haderlein, 342 U. S. 804; Door v. Donaldson, 90 U. S. App. D. C. 188, 195 F. 2d 764. Section 9 of the Act furnishes some safeguards. It provides, "In the exercise of any power or authority—

"(a) In General.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Impounding one's mail is plainly a "sanction," for it may as effectively close down an establishment as the sheriff himself. The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office, as I have said. It carries such a grave threat, it touches so close to First, Fifth, and Sixth Amendment rights, it has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order from which petitioner seeks relief is invalid. It seems to be a final order and there is no apparent administrative remedy.

It is clear, I think, that petitioner is entitled to judicial review of the interim order. Section 10 of the Administrative Procedure Act provides:

> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> . . . . . .
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> "(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . ."

The interim order should be lifted only if it is invalid. If it is lifted, the issue of its validity will become moot, see Myers v. Cheeseman, *supra*. The case is now pending in the Court of Appeals and will be decided by that court in due course. The Department of Justice advises me that a final administrative order will be made very shortly, probably in two or three weeks. If that order should be favorable to petitioner, she would, of course, receive all her mail and the case would become moot. If the order is adverse to her, its validity can be reviewed by the Court of Appeals. I was assured on oral argument that any mail intercepted under the interim order would be impounded and kept separate from the other mail that is subject to the final administrative order, until judicial review is had, so that the separate issue of the validity of the interim order will be open on review.

There is thus no danger that the issue presented by this application will become moot, if the decision of the Post Office goes against petitioner.

Petitioner presents a strong case for interim relief. Litigation, however, often places a heavy burden on the citizen; and he must frequently suffer intermediate inconveniences or losses to win his point. Since petitioner will, in due course, get judicial review of the important question of law tendered and since the action I am asked to take runs counter to the requirements of orderly procedure, I will deny the relief asked.

Application denied.